

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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5 In the Matter of:

6

7 SEARS HOLDINGS CORPORATION,

8

9 Debtor.

10 - - - - - x

11

12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 February 14, 2019

17 10:03 AM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: NAROTAM RAI

1 HEARING re Notice of Agenda of Matters Scheduled for Hearing
2 on February 14, 2019

3

4 Motion to Extend Exclusivity Period for Filing a Chapter 11
5 Plan and Disclosure Statement / Motion of Debtors Pursuant
6 to Section 1121(d) of the Bankruptcy Code to Extend
7 Exclusive Periods (document #2312)

8

9 Limited Objection of the Official Committee of Unsecured
10 Creditors (document #2544)

11

12 Motion Midwood Management Corp. to Confirm Termination or
13 Absence of Stay Motion for Order Declaring Automatic Stay
14 Inapplicable to Non-Residential real Property Lease
15 (document 932)

16

17 Debtors' Objection (document #2497)

18

19 Midwood Reply (document #2578)

20

21 Motion to Confirm Termination or Absence of Stay Motion for
22 Order Declaring Automatic Stay Inapplicable to Non-
23 Residential Real Property Lease filed by Veronique Urban on
24 behalf of Midwood Management Corp. (document #932)

25

1 Motion to Compel Immediate Payment of Postpetition
2 Arrearages; Granting an Administrative Claim; and Compelling
3 Debtors to Assume or Reject Agreement (document #1477)
4
5 Motion of Milton Manufacturing, LLC to (I) Compel the Debtor
6 to Assume or Reject Purchase Orders Related to Craftsman
7 Branded Goods Ordered by the Debtor Being Warehoused in
8 Taiwan, and (II) Grant Related Relief filed by Joel D.
9 Applebaum on behalf of Milton Manufacturing, LLC (document
10 #1479)
11
12 Debtors' Objection (document #2481)
13
14 Debtors' Objection (document #1547)
15
16 Motion for Relief from Stay to Allow Civil Litigation in
17 Action (1) and for Action, (2) To Proceed, and for the
18 Parties to Proceed with Alternative Dispute Resolution (ADR)
19 and Settlement Negotiations to which had Begun Since July
20 27, 2018, with Certificate of Service (document #1006)
21
22 Response of Cyrus Capital Partners, L.P. (document #2470)
23
24 Limited Objection of OCO Capital Partners, L.P. (document
25 #2471)

Joinder of Och-Ziff Capital Structure Arbitrage Master Fund,
Ltd. (document #2474)

Ex-Parte Motion of the Official Committee of Unsecured
Creditors for the Entry of an Order Pursuant to Bankruptcy
Code Sections 105 and 1103 and Bankruptcy Rules 2004 and
9016, Authorizing the Examination of the CDS Participants
(document #1557)

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. Okay, good morning.
3 In re Sears Holdings Corporation.

4 MR. SCHROCK: Good morning, Your Honor. Ray
5 Schrock of Weil Gotshal & Manges. I'm here on behalf of the
6 Debtors. It's good to be in front of you again, Your Honor,
7 with a substantially smaller audience.

8 THE COURT: Yes, we could have used the other
9 courtroom, but in any event, here we are.

10 MR. SCHROCK: Your Honor, first on the agenda is
11 the Debtors' Motion to Extend the Exclusivity Period. As we
12 notified your Chambers yesterday, we did resolve the limited
13 objection of the Official Unsecured Creditors Committee.

14 THE COURT: Great.

15 MR. SCHROCK: I have a revised order. May I
16 approach?

17 THE COURT: So, it's, in essence, a 60-day
18 extension?

19 MR. SCHROCK: It's a 60-day extension, Your Honor,
20 it's a -- we agreed to provide an update on the plan
21 process, which we would anyway, at the next omnibus hearing
22 on March 21st, and for the record, of course, we're going to
23 agree to negotiate with the UCC on the plan in good faith,
24 which we would always do.

25 THE COURT: Okay.

1 MR. SCHROCK: But I do have a red line of the
2 order, if you'd like to see it.

3 THE COURT: That's fine. You can hand that up.
4 For what it's worth, that's what I had in mind, if you
5 hadn't agreed, so.

6 MR. SCHROCK: Well, I'm glad we agreed.

7 THE COURT: Okay, so, this will get entered.

8 MR. SCHROCK: Okay, great, thanks very much, Your
9 Honor. And just a brief update for you on -- since what we
10 had going since we were last in front of you. We did, as I
11 know you -- as I'm sure you're aware, we did close the sale
12 on Monday, thank goodness, so that was a big accomplishment,
13 obviously, in these cases. We've also filed a Motion for a
14 Claims Bar Date, and for 503(b)(9) procedures, which provide
15 for, we think, an expedited and efficient way to resolve
16 those 503(b)(9) claims. We filed this morning, a Motion for
17 PI procedures for Personal Injury Claims, so that we can
18 resolve those efficiently. We have started to move forward
19 with the PVGC settlement, including executing Trusteeship
20 papers so that the PBGC can take over the plan. They would
21 then dismiss the action in the Northern District of Illinois
22 for an involuntary termination. And now, frankly, we're
23 turning the Plan and Disclosure Statement, sitting down with
24 the UCC, sitting down with the other constituents, and our
25 intent is to move very quickly, because --

1 THE COURT: It would make sense.

2 MR. SCHROCK: Exactly, we have to finish this up
3 quickly. We intend to do that, and so, we have -- the 60-
4 day extension takes the plan filing period out to April
5 15th, but my expectation is that we can get something on
6 file substantially before that, but we will work with the
7 UCC as well as other parties to make sure that we try and
8 bring it to Your Honor in as smooth a process as possible.

9 THE COURT: That's all to the good. The bar date
10 motion, I'm assuming you don't need a hearing on that. On
11 the 503, I guess that's for the next omnibus hearing, or are
12 we looking to do that --

13 MR. SCHROCK: It's part of the --

14 THE COURT: It's all part of the same motion, so
15 you're not going to be looking for a hearing on that?

16 MR. SCHROCK: It is. Not unless it's needed, Your
17 Honor.

18 THE COURT: Okay. All right, that's fine. I
19 think the sooner rather than better for that as well.

20 MR. SCHROCK: Okay, fine. With that, Your Honor,
21 I think that we're going to go with -- go out of order, with
22 your permission, because the ex-parte motion of the UCC for
23 the 2004 examination related to the MTNs is here on consent.

24 THE COURT: Okay. I saw that email, so, why don't
25 we take that motion? Of course, it's no longer ex-parte,

1 and it hasn't been for a while, but --

2 MR. O'DONNELL: Good morning, Your Honor. For the
3 record, Sean O'Donnell with Herrick, Feinstein. With me is
4 my colleague, Steven Smith. We are the Proposed Conflict
5 Counsel for the Unsecured Creditors Committee.

6 THE COURT: Right.

7 MR. O'DONNELL: As an aside, our application --
8 retention application was submitted yesterday morning. I
9 understand that that's scheduled to be heard at the next
10 omnibus hearing on March 21st.

11 THE COURT: Okay.

12 MR. O'DONNELL: Okay. Your Honor, just very
13 briefly, so, on January 12th, 2018, on behalf of the
14 Committee, we moved pursuant to 2004(a) to conduct an
15 examination of certain parties that participated in the
16 Debtors' sale or potential sale of certain medium-term notes
17 that were owned by the Debtors under a non-Debtor affiliate,
18 Sears Re. Your Honor, there were three responses that were
19 filed in response to our 2004 Motion. Cyrus filed a
20 response that Cyrus Capital Partners, which stated that
21 they, quote, "did not oppose the Rule 2004 Motion," but,
22 pursuant to our agreement with Cyrus counsel, they reserve
23 their rights with respect to the scope and timing of the
24 discovery. There was also a limited objection, and that was
25 filed by OCO Capital Partners on behalf of itself and its

1 managed funds. OCO, Your Honor, the funds that are managed
2 were previously managed by Omega, represented by Quinn
3 Emanuel. Omega ceased, as I understand it, being the
4 managers as of January 1, 2019, but it's the same funds that
5 we were talking about previously.

6 THE COURT: Okay.

7 MR. O'DONNELL: And then Och-Ziff Capital filed a
8 joinder to that motion. There were no other responses that
9 were filed with respect to the 2004 motion, as you noted, is
10 no longer ex-parte, and what we've done since filing our
11 Motion in accordance with representations we made to the
12 Court in our reply brief, is we've reached out to the
13 parties, and I'm happy to report that we've reached an
14 amicable resolution. Just very briefly, if I can outline it
15 for Your Honor --

16 THE COURT: Sure.

17 MR. O'DONNELL: -- and we have a proposed order.
18 So, the scope of the order for now, Your Honor, would be as
19 follows -- or the scope of discovery, excuse me. We would
20 be seeking discovery as it relates to the sale of the MTNs,
21 also the MTNs themselves, and the SRAC Credit Default Swaps.
22 We would also be seeking discovery, the second category has
23 to do with the de-risking and the offsetting transactions
24 that we understand took place between December 20th, 2018
25 and January 1 -- January 4, excuse me, 2019. They were

1 described in some of the pleadings that were submitted by
2 Omega to Your Honor.

3 THE COURT: Great.

4 MR. O'DONNELL: And then finally, Your Honor,
5 there is a category that relates to the Barclays Consortium
6 order -- offer, excuse me. You may recall, at the December
7 20th hearing, there was reference to that. We're seeking
8 discovery of that as well. In terms of the time period,
9 there was a disagreement with the parties as to what would
10 be the right time period, and based on discussions with
11 counsel, for now, we've agreed that the time period would be
12 December 20th, 2018 through January 4th, 2019, which is when
13 we understand that the transactions, the de-risking and
14 offsetting transactions closed.

15 Finally, Your Honor, we would also be seeking
16 discovery as it relates to -- pardon me, we would also be
17 taking a deposition of each of the CES participants, and all
18 of this is without prejudice to us coming back on behalf of
19 the Committee saying that we need additional discovery, and
20 of course, it's without prejudice to the other parties
21 saying, no you don't.

22 THE COURT: Okay. That sounds like a reasonable
23 resolution. The one thing I would add is that I guess, from
24 what I heard, you still have a reservation with Cyrus and
25 maybe the other parties as to whether -- when you actually

1 send out your document requests or the like, if it's
2 something over-broad or the like, they can raise it with you
3 and you can still try to work it out, or have you actually
4 worked out the scope?

5 MR. O'DONNELL: So, we've worked out the scope. I
6 will say, it's noted in the order, this is where I get out
7 in front of my skis, but we then have to identify the
8 custodians, the search terms, et cetera.

9 THE COURT: Okay.

10 MR. O'DONNELL: We're going to work with the other
11 parties on that, and we've agreed that if we can't reach a
12 resolution, which I don't expect to be the case, then we
13 would come back before Your Honor.

14 THE COURT: Okay, but then that -- the short
15 answer to my question is, I won't be expecting motions to
16 quash or Chambers conferences on the scope --

17 MR. O'DONNELL: Exactly.

18 THE COURT: -- because you've worked that out with
19 the parties?

20 MR. O'DONNELL: And it's laid out in the proposed
21 order that we have, if I can approach, Your Honor?

22 THE COURT: Okay. Good enough, that's fine. You
23 can email that to Chambers.

24 MR. O'DONNELL: Yes. Would you like a hard copy
25 as well, or just the --

1 THE COURT: I don't need it. I think that you've
2 summarized it, unless any of the other parties who
3 (indiscernible) want to add anything. Okay. So, you can
4 email that over to Chambers.

5 MR. O'DONNELL: Thank you, Your Honor.

6 THE COURT: Thank you.

7 MR. SCHROCK: Your Honor, I believe we have a
8 couple of third-party motions, but in the vein of minimizing
9 administrative expenses, may I be excused?

10 THE COURT: Yes.

11 MR. SCHROCK: Okay.

12 THE COURT: Okay, thank you. Okay, so, we were
13 going back to the agenda now, and I think the next matter on
14 the agenda is the Midwood Management Motion.

15 MR. COLLINS: Good morning, Your Honor. Patrick
16 Collins, Farrell Fritz on behalf of Midwood Management Corp.

17 THE COURT: Good morning.

18 MR. COLLINS: Midwood Management is the agent for
19 Expressway Plaza I and Farmingville Associates. They are
20 the tenants-in-common, the owners of the property out in
21 Farmington, New York. There's a shopping center there known
22 as Expressway Plaza. One of the tenants in the shopping
23 center is Kmart, under a lease entered into in 1991. A copy
24 of the lease is next to our Motion. We filed the Motion
25 seeking entry of an order pursuant to § 362(b)(10) of the

1 Bankruptcy Code, declaring that the automatic stay does not
2 apply to Landlord's efforts to recover the leased premises
3 from Kmart. The automatic stay does not apply because the
4 term of the lease is expired. The term expired by operation
5 of the conditional limitation provision in the lease, an
6 uncured pre-petition default, in Landlord's pre-petition
7 service of a Notice of Election to treat the term of the
8 lease as expired within ten days on account of a default.

9 THE COURT: The default is a payment default,
10 right?

11 MR. COLLINS: Failure to pay additional rent for
12 the Landlord's costs to carry out maintenance at the leased
13 premises, that's correct.

14 THE COURT: Under 25(a) of the lease?

15 MR. COLLINS: Correct. Under New York law, as a
16 result of the condition limitation, the term of the lease
17 was shortened upon landlord's service of the Lease
18 Termination Notice. The term is shortened from the
19 termination date stated in the lease to ten days from the
20 date notice was given.

21 THE COURT: Well, can we stop on that point?

22 MR. COLLINS: Sure.

23 THE COURT: What New York law are you referring
24 to? I mean, the Debtors dispute whether there actually was
25 a default, under 25(a) and (f), that would tender the

1 obligation to pay more of the rent, the roughly over --
2 well, over \$215,000 of additional rent.

3 MR. COLLINS: Correct, it has been --

4 THE COURT: So, what is the -- I mean, that's
5 still in dispute, so, how did it terminate?

6 MR. COLLINS: It terminated because the Landlord
7 did not respond to -- the Tenant did not respond to the
8 Landlord's Notice of Default and opportunity to cure at all,
9 neither to protest, neither to pay, neither to ask for more
10 time.

11 THE COURT: Well, it's doing it now. It's
12 disputed that there was a default.

13 MR. COLLINS: It is doing it now, after the
14 expiration of the ten-day period in the Lease Termination
15 Notice. If the Court rules that § 362(b)(10) were to apply,
16 we would, of course, then go to State Court and commence a
17 Landlord-Tenant Action to evict Kmart, and Kmart can arrange
18 whatever defenses it wants in the Landlord-Tenant Action.

19 THE COURT: So, the reason I asked is, I don't
20 think you cited to me any New York cases that stand for the
21 proposition that, if the Debtor disputes the underlying
22 default that causes the conditional termination, the
23 Landlord automatically has the right to assume that the
24 lease is terminated for all purposes. Doesn't it have to be
25 a Court determination of that dispute?

1 MR. COLLINS: As I said, the right of Kmart to
2 contest the default is still there. They can assert that in
3 State Court, if they so choose.

4 THE COURT: Okay. All right, so --

5 MR. COLLINS: Or here, if it -- or here.

6 THE COURT: -- what is the -- but then it hasn't
7 terminated, because that dispute still is live, isn't it?

8 MR. COLLINS: No, it's terminated, depending on
9 who's right and who's wrong.

10 THE COURT: But, I know, but that hasn't been
11 decided yet, so it's hard for me to see how it's actually
12 terminated, since that issue is still an open issue.

13 MR. COLLINS: I guess, my view is that if the
14 Landlord is correct, the lease is terminated.

15 THE COURT: Well, that's right, and if the Debtor
16 is correct, it hasn't.

17 MR. COLLINS: That's right.

18 THE COURT: So, it's hard to say it has
19 terminated, because it's an open issue.

20 MR. COLLINS: But the events have already
21 occurred. I mean, the events --

22 THE COURT: That's fair.

23 MR. COLLINS: -- the events that will lead to a
24 determination as to whether the lease is terminated or not
25 have already occurred.

1 THE COURT: But you're saying it actually has
2 terminated.

3 MR. COLLINS: Yes.

4 THE COURT: Are you asking me for a determination
5 today that it has?

6 MR. COLLINS: I'm asking the Court for a
7 determination of § 362(b)(10), under that provision, that
8 the automatic stay does not apply because the lease is
9 terminated.

10 THE COURT: But, are you asking on the basis of
11 saying that you want me to decide whether your client is
12 correct that there was, in fact, the default that gave rise
13 to the payment obligation, or that -- or, in the
14 alternative, that the Debtor is correct and I need to decide
15 that issue; or are you basically saying that I should assume
16 that, if the Landlord asserts there's a default, then that's
17 enough for a termination?

18 MR. COLLINS: We don't dispute that the issue
19 needs to be decided somewhere.

20 THE COURT: All right.

21 MR. COLLINS: And that can be here, that can be in
22 Landlord-Tenant court in State Court.

23 THE COURT: All right. So, it doesn't seem to me
24 that it's actually terminated.

25 MR. COLLINS: Once again, I --

1 THE COURT: For the purposes of this hearing.

2 MR. COLLINS: Well, I --

3 THE COURT: Which -- I'm not trying to get you to
4 say that your position is incorrect. I fully understand
5 your position. All I'm saying is, it doesn't seem to me
6 that it actually has terminated because there's still an
7 open issue.

8 MR. COLLINS: It's still an open issue, but there
9 are open issues in the other cases where courts --

10 THE COURT: Actually, I disagree with that
11 completely. And I also disagree with the meaning of §
12 362(b)(10), which doesn't say, "has terminated," it says,
13 "stated term".

14 MR. COLLINS: Correct.

15 THE COURT: When I look at the lease, the term of
16 the lease is stated in Paragraph 2, not in Paragraph 25.

17 MR. COLLINS: But that's what Policy Realty is all
18 about, Your Honor.

19 THE COURT: Policy Realty is not really about
20 that. Policy Realty is about the fact that when a lease
21 terminates for any reason --

22 MR. COLLINS: Right.

23 THE COURT: -- it can't be assumed because it's no
24 longer a lease. That's different than (b)(10). At least,
25 that's what the editors of Collier's say, and the majority

1 of cases.

2 MR. COLLINS: But Policy Realty dealt with the
3 conditional limitation that -- that's the nature of a
4 conditional limitation, it shortens --

5 THE COURT: That has already been decided.

6 MR. COLLINS: -- it shortens the terms of the
7 lease.

8 THE COURT: There are two different points.

9 MR. COLLINS: Right, okay.

10 THE COURT: And, frankly I don't think this was
11 necessary for the decision in Policy Realty, or, I don't
12 think, even briefed to the District Court or the Court of
13 Appeal -- or the Second Circuit. There -- and Collier's
14 makes this clarification, too: there are two different
15 concepts pertaining to termination of a lease and the
16 Debtors' ability to continue with the lease. Concept one is
17 really the concept that was issue in Policy Realty, which
18 is, you can't assume a lease that is over, that is done, and
19 you know it's done, because there's no remaining issue. You
20 can't create a new lease, in other words, you have to live
21 with the lease you have. That's a function of just the
22 definition in § 365, which is the word, "lease". If you
23 don't have a lease anywhere because it's over, you don't
24 have it.

25 So, the case law is quite clear, you can't revive

1 a lease if it's over, although, even there, the courts say,
2 under New York law, you actually can revive a lease under
3 RPAPL 749 because there's an ability to go back to State
4 Court and say, reconsider the issuance of the order of
5 eviction, Judge, the Debtor is ready to assume the lease
6 under 365; and there are plenty of cases that deal with
7 that: Mad Lolo, Joker Enterprises, et cetera. That's one
8 set of issues, is the lease over or not?

9 There's a separate set of issues, which are
10 covered by § 362(b)(10), and § 541(b)(2), and that's a much
11 more limited provision that says, if the lease is expired by
12 "its stated term," not that it is terminated, but expired by
13 "its stated term," then the stay doesn't apply and it's not
14 property of the estate. Now, it's pretty easy for people to
15 figure out, including judges: even judges could figure this
16 out, that if a lease runs for ten years, that's its stated
17 term, the lease runs for ten years, and you're now in year
18 11, the lease is over its stated term, it's over. And
19 Congress said, well, at least in those circumstances, we're
20 not going to engage in any more speculation. It's over.

21 That's what, I think, § 362(b)(10) and the same
22 provision in 541, are dealing with, not a conditional
23 termination or consequential termination, which are dealt
24 with in the cases that deal with whether you still have a
25 lease or not. But, all of those cases, and it's the same

1 under New York law, that's why we have Yellowstone
2 injunctions, is, if a landlord says the lease is over
3 because you've defaulted and we have this default provision,
4 we can send a notice and if it's not cured, then the lease
5 is terminated, that's a whole separate set of issues where
6 you have controversies. You have them all the time. You
7 know, "No, Judge, there wasn't a default, you know, they --
8 this is a pretext. We've been living up to our lease." And
9 so, that's a whole separate set of issues, and those leases
10 aren't over until it's over. And that has to be decided by
11 someone. I don't -- I believe -- I know there are a few
12 cases going the other way, but I believe that Congress
13 understood that distinction, and by using the phrase,
14 "stated term," made it.

15 So, I think you're absolutely right that Policy
16 Realty stands for the proposition that if the lease really
17 is over, for whatever reason, whether it's because the
18 stated term has run, or because there's a, you know, a
19 consequential termination, the Debtor can't revive it,
20 although, frankly, there's a lot within that phrase, "the
21 lease is over," because we know that it actually can be
22 revived, even if the warrant of eviction is issued, because
23 that's what Mad Lolo and 749 of the RPAPL say. But, in
24 Policy Realty, that's what it was: it was a consequential
25 breach, it wasn't a "term" breach, and it was over. I

1 appreciate that they quote -- they cite 362, but they didn't
2 need to, and I think if anyone had actually made the
3 argument to them, they would have gotten it, and I view that
4 application as dicta, as far as § 362(b)(10) and §
5 541(b)(2), though. It's just a separate -- it's not
6 necessary, and it's against the majority of case law, the
7 leading commentator, and the plain language of the statute.

8 MR. COLLINS: I would point out to you, it's a
9 District Court decision that was affirmed by the Second
10 Circuit.

11 THE COURT: I know, but it didn't -- it's dicta on
12 that point, because the lease was over.

13 MR. COLLINS: But the reason --

14 THE COURT: And the law is really clear, that if
15 you know the lease is over, if there's no issue about the
16 dispute, then -- I'm not alone in this. In the Artisanal
17 case, Judge Garrity reached the same result. It's not over.
18 It's a consequential default, it's disputed. And there are
19 plenty of other judges that have done the same thing.

20 MR. COLLINS: Understood. But I would submit that
21 the reasoning of Policy Realty is sound. I mean, that's
22 what a conditional limitation is.

23 THE COURT: It's totally sound in terms of the
24 proposition that, if a lease is truly terminated, for
25 whatever reason, then it cannot be revived. That's -- it's

1 totally sound on that point. And that's what the -- you
2 know, everything else under that case is dicta.

3 MR. COLLINS: On Policy Realty, it hadn't
4 completely terminated as of the filing date. The TRO is
5 said to expire later that day, so --

6 THE COURT: But there was nothing to do. There
7 was nothing -- there's no way to extend it. There was no
8 dispute about the default. They were done, and they weren't
9 in possession.

10 MR. COLLINS: And they were not in possession.

11 THE COURT: So, it's -- you know, it's -- listen,
12 you may appreciate that this is not the first time I've
13 dealt with these arguments.

14 MR. COLLINS: Mm hmm.

15 THE COURT: And that I think that, obviously,
16 landlord attorneys love Policy Realty, and they frequently
17 cite it for more than it stands for. I don't blame them for
18 doing that, but, you know, it's -- the statute's clear, I
19 believe. We have to decide this issue, whether there's a
20 consequential default, eventually --

21 MR. COLLINS: You mentioned Artisanal and Lolo,
22 Your Honor.

23 THE COURT: Right.

24 MR. COLLINS: In both of those cases, the outcome,
25 in both of those cases, was that the Court ruled that §

1 362(b)(10) did not apply --

2 THE COURT: Right.

3 MR. COLLINS: -- but that the stay was lifted --

4 THE COURT: Right.

5 MR. COLLINS: -- to allow litigation somewhere to
6 determine --

7 THE COURT: That's right.

8 MR. COLLINS: -- to determine the underlying
9 issue, so --

10 THE COURT: But you haven't sought that relief.

11 MR. COLLINS: Well, because -- because 362 --
12 well, because the Sonnax Factors that they cited were in a
13 different context.

14 THE COURT: I know, but there's no motion for
15 relief of the stay in front of me.

16 MR. COLLINS: The Court has discretion to award
17 alternate remedies in the course of the outcome, here.

18 THE COURT: Well, I don't know -- I haven't even
19 looked at that. Is there an arbitration provision in the
20 lease, for example? I don't know if there's some sort of
21 ADR in the lease that would be relevant to me? Related to
22 that, I don't even know when this lease is stated to be
23 assumed, or are they looking to reject it? I mean, that's
24 clearly a Sonnax factor. There's no reason to send this to
25 a State Court litigation if it's going to be rejected

1 anyway. Then, I'm just -- then I would decide the damages,
2 if you really want to pursue them, through a proof of claim.
3 So, I think it's premature to -- I mean, I understand why
4 you didn't move for relief from the stay, because I think
5 it's premature.

6 MR. COLLINS: So, as long as our rights to -- as
7 to the issue as to whether the lease is terminated is
8 preserved, Your Honor.

9 THE COURT: Oh, clearly. Clearly it is, and you
10 may -- you may be right about that, ultimately. It may be
11 that your client was perfectly within its rights to declare
12 an emergency and do the parking lot work and bill \$215,000
13 at 18 percent interest, which actually, where is that
14 provision, the 18 percent provision?

15 MR. COLLINS: In 25(f), Your Honor.

16 THE COURT: Okay. All right.

17 MR. COLLINS: If you keep reading, it says that --

18 THE COURT: All right. So, it may be perfectly
19 appropriate, but it's a -- given the emails, the Debtors did
20 dispute it when it first -- when they first got the notice.

21 MR. COLLINS: Yeah, we don't read the emails that
22 way.

23 THE COURT: Well, I mean, the guy says, we don't
24 think it's an emergency.

25 MR. COLLINS: Well, the work was done, and they

1 don't dispute that the work needed to be done.

2 THE COURT: I don't know. You know, that's for
3 another day, I think. So, I will deny the Motion insofar it
4 seeks a declaration that the stay doesn't apply to the
5 Landlord's actions to terminate the lease, and to enforce
6 its rights under the lease, including eviction, and the
7 related proposition that, under § 541, the lease isn't
8 property of the estate. That denial, though, is clearly
9 without prejudice to the Landlord's contention that, on a
10 proper record, with, you know, proper procedures, which I'm
11 assuming would include discovery under the Part VII rules,
12 that, in fact, the default that resulted in the assertion
13 that another \$215,000 and change was owing, in fact, did
14 occur, and was -- that there's no defense to that default.

15 There is a related proposition that I haven't
16 given a whole lot of thought to, which is that the default
17 here is a payment default, and the Notice in respect of the
18 termination because of the payment default didn't occur
19 until the post-petition period. You may well have a
20 response to that. I think I understand what it is, but that
21 may affect the analysis, too, as opposed to a performance
22 default that, frankly, can't -- you know, you can't rewrite
23 that, if it, in fact, occurred. But I'm going to, therefore
24 -- you know, the Debtor can send in an order to that effect.
25 They should run it by you to make sure, you know, the

1 reservation -- I'm not a big one on reserving rights, but I
2 think it's worth putting into the Order here.

3 MR. COLLINS: I think the ruling is clear that the
4 right to argue that the lease is terminated is preserved,
5 and I --

6 THE COURT: It absolutely is.

7 MR. COLLINS: -- I appreciate it, Your Honor.

8 THE COURT: But I -- just to close out the record
9 on this, then, the motion before me seeks a determination
10 that the lease between the parties here terminated, for
11 purposes of § 363(b)(10), either -- well, in fact, it
12 terminated post-petition. But § (b)(10) says that "The
13 filing of a petition under the Bankruptcy Code does not
14 operate as a stay under subsection (a) of this section of
15 any act by a Lessor, under a lease of non-residential real
16 property that has terminated by the expiration of the stated
17 term of the lease before the commencement of, or during, a
18 case under this title, to obtain possession of such
19 property." I'm going to go back and emphasize the phrase:
20 "and has terminated by the expiration of the stated term of
21 the lease". The leading treatise on bankruptcy, Collier on
22 Bankruptcy, notes, at Paragraph 362(b)(10), quote: "It
23 should be noted that this exception is limited to leases
24 under which the stated term expires, not to leases
25 terminated for other reasons. Leases completely terminated

1 pre-petition should not be considered property of the estate
2 because the Debtor retains no legal or equitable interest
3 after termination, except, perhaps, possession, to which the
4 automatic stay would apply. However, a lessor should be
5 stayed from terminating a lease for non-payment of rent, or
6 other cause, after commencement of a bankruptcy case.
7 Moreover, the Lessor remains stayed from seeking to retake
8 the premises, even after automatic termination of a lease
9 upon an event of default the termination occurs post-
10 petition. Only when the termination is based on expiration
11 of the agreed term of the lease, may the stay be
12 disregarded," close quote.

13 The most recent case to construe this section, and
14 there's a parallel section in § 541(b)(2) of the Bankruptcy
15 Code, I think, is In re Hotel Equities, LLC, 586 B.R. 870
16 (Bankr. E.D. Mich.) 586 B.R. -- I'm sorry, 2008. Now, in
17 that case, the lease actually did terminate pre-petition,
18 but not because of the expiration of its stated term. It
19 terminated because of the consequential termination
20 provision for a breach, and the Court there noted that a
21 number of courts have taken the position that termination,
22 under those circumstances, fits within § 362(b)(10), but
23 takes the view with, I think, the majority of the courts and
24 Collier's that (b)(10), by its plain terms, is much more
25 narrow, and just refers to the stated term of the lease, as

1 opposed to a consequential termination or simple
2 termination. The law is somewhat confused in some of the
3 cases cited for the contrary proposition that the Michigan
4 court disagreed with. They exacerbate that confusion by the
5 two very related concepts that are articulated by Collier's.
6 One is termination of the stated term, the other is
7 termination because the lease is over, in other words, for a
8 consequential default.

9 And that's complicated here by the fact that the
10 actual termination did occur post-petition, although the --
11 for a payment default, although the notice was sent pre-
12 petition, following a Default Notice that was pre-petition.
13 But, as I said during your oral arguments, I think some of
14 those cases that don't make the distinction that Collier's
15 makes, and I think that the statute requires, rely, in large
16 part, on *In re Policy Realty Corp.*, 2000 U.S. App. LEXIS
17 8846 (2d Cir. May 2, 2000), and in the lower Court District
18 Court opinion that appears at 242 B.R. 121 (S.D.N.Y. 1999).

19 But in that case there was really nothing left,
20 and the Debtor didn't have possession anyway, so, the second
21 proposition stated by Collier's applies, and the application
22 of § 362(b)(10) I view as dictum. That, I believe, is
23 confirmed by a number of opinions, including Judge Garrity's
24 opinion recently in, *In re Artisanal 2015, LLC.*, which is at
25 2017 Bankr. LEXIS 3813 (Bankr. S.D.N.Y. Nov. 3, 2017), at

1 pages 29-33, and Judge Garrity's discussion about how, under
2 New York law, the issue of consequential defaults, which
3 this is -- which is what this is in the facts before me, are
4 dealt with through the Yellowstone injunction process and,
5 even under that process, the fact that a Yellowstone
6 injunction expires does not mean that the lease has been
7 terminated as a result of the consequential default because
8 there has not yet been a determination by a court that the
9 default occurred.

10 As stated by Warren's Weed New York Real Property,
11 § 82.30, subparagraph 281: "A tenant served with a notice to
12 cure an alleged violation of a lease has two options. She
13 can either comply with the landlord's demands or litigate
14 the matter. However, with the landlord's -- "complying with
15 the landlord's demands can be burdensome, however; the lease
16 contains a conditional limitation permitting the landlord to
17 terminate the lease in the event of a tenant's failure to
18 cure the breach prior to the deadline for the cure, the
19 tenant who fails to cure in time will be subject to
20 eviction," but then, and this is the important part of the
21 section: "in the event the court ultimately determines that
22 the tenant's conduct constituted a breach of the lease."
23 That hasn't happened here yet. There hasn't even been a
24 warrant of eviction. There hasn't been a lawsuit started
25 over the dispute.

1 So, the lease here, I believe, until the dispute
2 is resolved some way, and it may be resolved very quickly
3 under some of the theories that the landlord stated in its
4 reply brief, but until the dispute is resolved, the lease is
5 not terminated under the default provisions, and, therefore,
6 can still be a live lease where the automatic stay applies.
7 That is separate and apart from the fact that the Debtor
8 here is still in possession, unlike the Debtor in Policy
9 Realty. Now, their possession may well simply lead to a
10 very quick lift stay order, but it's not, arguably, covered
11 by Policy Realty either. But I think the main point is
12 that, there is a live lease until the dispute is decided,
13 and therefore the stay still applies. § 362(b)(10) doesn't
14 apply, it's still property of the estate: 541(b)(2),
15 therefore, doesn't apply, and the motion will be denied on
16 that basis.

17 I'll note that, whether a live lease is or isn't -
18 - whether a lease is still alive or not, is a tricky
19 question, even after the issuance of a warrant of eviction,
20 given that courts in the Southern District have permitted
21 debtors, even after the issuance of a warrant of eviction,
22 that have convinced the judge to approve assumption on the
23 condition of their warrant being vacated under § 749 of
24 R.P.A.P.L., that the court will still keep the stay in place
25 to let the debtor under appropriate circumstances, go back

1 to State Court and seek the vacatur of the warrant of
2 eviction, as discussed by a number of courts, including
3 Judge Glenn in the Mad Lolo case that the parties have
4 cited. So, I'm going to ask the Debtors to prepare an
5 order, as I said, and they should run it by you before
6 submitting it to Court.

7 MR. COLLINS: One housekeeping matter, Your Honor.
8 The Debtor has been paying, and the landlord has been
9 accepting --

10 THE COURT: I think the landlord should certainly
11 feel free to cash the check without prejudice to these
12 rights.

13 MR. COLLINS: Yeah, the --

14 THE COURT: You're not going to be getting lured
15 into a finding that you've waived the default by cashing a
16 check.

17 MR. COLLINS: We would ask that that premise be
18 applied to the real estate taxes, which are now --

19 THE COURT: Well, if it's covered by the lease, I
20 mean, that's part of the rent. That's -- you know.

21 MR. COLLINS: Thank you, Your Honor.

22 THE COURT: Okay. That doesn't require the Debtor
23 to pay the \$215,000 because that's -- we don't know whether
24 that's actually owing or not.

25 MR. COLLINS: I understand.

1 THE COURT: Okay.

2 MR. COLLINS: Thank you, Your Honor.

3 THE COURT: Okay, thank you.

4 MR. FAIL: Thank you, Your Honor. The next item
5 on the agenda are the Motions filed by Milton Manufacturing,
6 LLC. I'm not sure if Milton's attorneys -- oh, its
7 attorneys are here.

8 MS. BENCZE: Yes. Okay. Nola Bencze of Clark
9 Hill on behalf of Milton Manufacturing, LLC. Your Honor,
10 we're here on two motions today. The first Motion is to
11 Compel the Payment of Administrative Expense, Pursuant to §
12 503(b)(1), or in the Alternative, Pursuant to § 503(b)(9).
13 I do note --

14 THE COURT: And that's with respect to certain
15 purchase orders?

16 MS. BENCZE: Correct, Your Honor, certain --

17 THE COURT: Prior to the motion.

18 MS. BENCZE: -- of the Craftsman -- Craftsman
19 Tools.

20 THE COURT: Right. That were delivered to Sears
21 in California on October 18th.

22 MS. BENCZE: Correct, Your Honor.

23 THE COURT: Okay. Pursuant to pre-petition
24 purchase orders.

25 MS. BENCZE: Right, correct. I mean, I think,

1 Your Honor, you know, not to sort of jump into it, but I
2 could jump into it. There doesn't seem to be a dispute that
3 the goods were ordered pre-petition. I don't know what
4 (indiscernible). The case was filed October 15th, goods
5 were delivered on October 18th, and I believe, then November
6 9th. And the Debtor took the goods, accepted the goods, and
7 as far as we know, what we understand, they sold the goods,
8 and have profited from the sale of those goods. And as a
9 consequence, owes us \$377,132.16. We have, in our motion
10 here, relied upon an analysis of the First Day Order that
11 was signed, dealing with a shipment of these pre-petition
12 goods, as well as an analysis of § 503(b)(1). The Order,
13 however, Your Honor, is extremely critical (indiscernible).

14 THE COURT: I -- I tried to -- I actually don't --
15 in the binder I have, I don't have a copy of that Order.
16 Does -- do either of you have one that I could --

17 MS. BENCZE: I do. I have some hieroglyphics on
18 it, though, Your Honor.

19 THE COURT: Well --

20 MS. BENCZE: I don't have a clean copy.

21 THE COURT: Do you have an extra copy, on the
22 Debtors' behalf? I mean, I don't think the motion itself
23 refers to the Order. I think in the reply you refer to it.

24 MS. BENCZE: Yes, I did.

25 MR. FAIL: May I approach, Your Honor?

1 THE COURT: Sure. Yeah. Thanks. Okay.

2 MS. BENCZE: Well, actually, I think, in our
3 motion, original motion due would refer to the Order, but
4 because the Debtor, in its opposition to us, sort of said,
5 we were kind of acting like we were entitled.

6 THE COURT: Well --

7 MS. BENCZE: And I don't want the Court to think
8 that we're trying to jump ahead of anybody.

9 THE COURT: No, I'm just -- I really am just
10 trying to figure out which -- what paragraph should I be
11 focusing on.

12 MS. BENCZE: It's Paragraph 8, Your Honor.

13 THE COURT: Paragraph 8? Okay.

14 MS. BENCZE: Eight.

15 THE COURT: Okay. So, that says: "All undisputed
16 obligations of the Debtors arising from the post-petition
17 delivery or shipment" by -- "of goods under the pre-petition
18 orders are granted administrative expense priority status,
19 pursuant to § 503(b)(1)(a)," so, "post-petition delivery or
20 shipment," and so here, they're delivered post-petition.
21 So, that --

22 MS. BENCZE: Correct, Your Honor.

23 THE COURT: When I say, why is that disputed? I
24 don't know.

25 MS. BENCZE: No, I don't think there is a dispute.

1 THE COURT: No, I'm looking over at the Debtors'
2 counsel.

3 MS. BENCZE: Oh, I'm sorry.

4 MR. FAIL: Yeah.

5 THE COURT: Okay.

6 MR. FAIL: So, for the record, Garrett Fail, Weil,
7 Gotshal & Manges for the Debtors. We did dispute. We
8 dispute a number of things, but what we said in our
9 pleadings was, we weren't going to dig in.

10 THE COURT: At this point.

11 MR. FAIL: The seven P.O.s -- at this point, to
12 figure out, if and when those seven P.O.s were delivered to
13 ports abroad, if and when they shipped, if and when they
14 were received, if and when they were sold.

15 THE COURT: All right.

16 MR. FAIL: Completely didn't engage in this
17 exercise, Your Honor.

18 THE COURT: So, you're relying more on the second
19 clause in this paragraph, it's after saying that they're
20 granted administrative expense priority status, which says,
21 quote: "And the Debtors are authorized, but not directed, to
22 pay such obligations in the ordinary course, consistent with
23 the party's business practices."

24 MR. FAIL: Your Honor, Your Honor, on that point,
25 we also dispute that there could be reliance upon someone to

1 ship and drop off goods to a consolidator abroad as if they
2 could have --

3 THE COURT: No, that's, in fact, their § 503(b)(9)
4 point, I think.

5 MR. FAIL: Well, also, that there's a reliance on
6 this, that's my only point.

7 THE COURT: Okay.

8 MR. FAIL: First of all, there's no evidence, but
9 second of all, that someone could deliver --

10 THE COURT: Anyway, but those disputes, you
11 haven't gotten to the facts on that.

12 MR. FAIL: No, but that anybody could necessarily
13 rely on that order, after they've delivered goods, is
14 something that we would contest. That was --

15 THE COURT: I'm sorry, you're saying that they
16 delivered the goods after the order was entered, not but --
17 but these here, they delivered before the order was entered.

18 MR. FAIL: That's my point, Your Honor.

19 THE COURT: Arguably. If they did -- if the facts
20 were that they delivered the goods before the order was
21 entered, how could you rely on the order?

22 MR. FAIL: Thank you, Your Honor.

23 THE COURT: Okay. All right.

24 MS. BENCZE: Right. Your Honor, this is the
25 issue. I think that they defined the pre-petition orders,

1 which are mentioned in your Order, it's defined in their
2 Motion that was seeking this Order from the Court. And in
3 that Motion, they define the pre-petition orders as \$162
4 million dollars' worth of merchandise from suppliers --

5 THE COURT: Right.

6 MS. BENCZE: -- or vendors that will not be
7 delivered until after the commencement. So, to me --

8 THE COURT: It's really a -- ultimately, that's a
9 fact issue, is whether people relied on that. I don't even
10 know if your clients read it, that motion. So, I think the
11 real point is, should --

12 MS. BENCZE: But that's -- sorry.

13 THE COURT: -- should I focus on those issues or
14 should I wait for a point when administrative expenses are
15 going to be paid, generally, in the case?

16 MS. BENCZE: Well, this is our problem, Your
17 Honor. I mean, I have a client --

18 THE COURT: It's a timing issue, in other words.

19 MS. BENCZE: Yeah, it's a timing issue.

20 THE COURT: Yeah.

21 MS. BENCZE: And you know, nothing new in
22 Bankruptcy Court, people are in need of money. The whole
23 purpose of the § 503(b)(1) is to get paid for administrative
24 expenses, and we believe we even fit into that, if you were
25 to just analyze the statute on its own. So, there are other

1 administrative creditors who are getting paid, and perhaps
2 to our detriment, if, in fact, the estate becomes
3 administratively insolvent.

4 THE COURT: Right.

5 MS. BENCZE: So, it's the -- as Your Honor
6 correctly pointed out, it's the timing of this, and
7 thankfully, they have filed a motion for § 503(b)(9).

8 THE COURT: Right.

9 MS. BENCZE: Right? They did last night, I
10 haven't looked at it, but it's sort of what we were hoping
11 would happen, and so --

12 THE COURT: They've also -- they've also --

13 MS. BENCZE: -- if not now -- if not now, when?

14 THE COURT: They've also committed to turn, right
15 away, maybe this afternoon Mr. (indiscernible) will let her
16 know, but right away, to negotiate a plan and exclusivity
17 that has been extended for only a very short period. We're
18 really talking, I think, about 60 days. You can't confirm a
19 plan without paying all the administrative expenses in full.
20 We also have -- I've been told that the ESL deal closed.
21 The, ESL agreed to assume a certain dollar amount of
22 payables. So, it does appear to me that -- well, I mean, I
23 have a question about that, which is, what is the timing on
24 that -- on actually identifying those payables and getting
25 them paid, but it seems to me that, even without that,

1 there's a reasonable possibility, or probability, that a
2 plan would be confirmed, or we'll know that one can't be
3 confirmed, in which case, administrative expenses will be
4 paid pro rata within a couple of months. Is that -- you
5 know. I -- I understand that a number of people who are
6 vendors to Sears are hurting, but can they wait a couple of
7 months?

8 MS. BENCZE: Well, you know, I have -- before
9 today, I was contacted by a few vendors similarly situated.

10 THE COURT: Right, right.

11 MS. BENCZE: There are vendors, I guess, that
12 consider themselves -- they had goods on the water, so to
13 speak, on their way from China that were about to be
14 delivered, and so, you know, they do look to this Order.

15 THE COURT: Well, but the Order is very clear that
16 the timing of the payment is open. I mean, that clause I
17 read, that, you know, it doesn't say it shall be paid
18 immediately.

19 MS. BENCZE: Right.

20 THE COURT: The Debtors are authorized, but not
21 directed, to pay in the ordinary course.

22 MS. BENCZE: Right. Well, we wanted to bring that
23 to your attention.

24 THE COURT: Okay.

25 MS. BENCZE: The second part of that motion had to

1 do with § 503(b)(9) but apparently, there's now a Motion
2 pending, but --

3 THE COURT: Well, the (b)(9) point, I have not
4 ruled on this issue. I don't know whether anyone in the
5 Southern District has ruled on this issue. I know there's
6 law in the Third Circuit that really distinguishes between
7 physical delivery to the Debtor and delivery on board a ship
8 or to an agent. That does kind of leave an odd glitch,
9 although maybe this Order is -- the whole point of this
10 Order was to assure people that that glitch wouldn't apply,
11 because you have § 503(b)(1). But, it's all -- I don't --
12 to me, it's going to be one or the other.

13 MS. BENCZE: So, you see resolution when that's to
14 be resolved?

15 THE COURT: Yeah. I mean -- yeah, Mr. Fail, as
16 I'm sure will tell me, we haven't looked at the facts here.
17 We don't know if, in fact, these deliveries occurred the way
18 the -- your motion says they did, and we reserved our rights
19 on that, and that's fair. But if, in fact, they were
20 delivered post-petition, it might not -- it wouldn't fall
21 under § 503(b)(9), but it -- I don't see why it wouldn't
22 fall under (b)(1).

23 MS. BENCZE: Okay, so --

24 THE COURT: Depending on whether they delivered,
25 actually, to Sears.

1 MS. BENCZE: My understanding is they delivered to
2 their warehouse.

3 THE COURT: Right.

4 MS. BENCZE: That's my understanding.

5 THE COURT: Okay. So, shall we deal with the 503
6 motion first, and then the separate assumption motion,
7 compel assumption or rejection motion, so let me hear from
8 Mr. Fail on the --

9 MS. BENCZE: Sure.

10 THE COURT: -- 503 motion.

11 MS. BENCZE: Okay. I'm sorry.

12 MR. FAIL: As long as both microphones can hear
13 me, Your Honor, I'm happy to stand here.

14 MS. BENCZE: Thank you.

15 MR. FAIL: Again, for the record, Garrett Fail,
16 Weil, Gotshal for the Debtors. Your Honor, I made clear
17 before, we haven't investigated the facts because our
18 response is that this shouldn't go forward now.

19 THE COURT: In terms of payment?

20 MR. FAIL: Yeah. Milton's suggestion that the
21 harm that others go first, it should be remedied by them
22 going first, is not the approach that the Debtors have
23 taken. The Debtors are saying, there's a bar date that's
24 being requested. All parties can file their claims. Claims
25 that are filed will be allowed unless objected to. That's

1 the simplest path. Creditors shouldn't be encouraged to run
2 to the Court to seek the allowance ahead of that, or to jump
3 the line, or to set the schedule --

4 THE COURT: Which actually creates more misery and
5 expenses.

6 MR. FAIL: Incredible amount, Your Honor, for a
7 \$300,000 Milton expected needs to be reconciled, prior to a
8 \$5 billion-dollar sale closing; we are paying attention to
9 small and large vendors and small and large things in these
10 cases, but the Debtors need the flexibility to administer
11 the cases in the most efficient way for all creditors.

12 THE COURT: Can you remind me --

13 MR. FAIL: Yeah.

14 THE COURT: -- the ESL sale, the buyer assumed
15 \$166, I think, million of payables. Is that -- if this is,
16 in fact, a post-petition payable, is that the bucket it
17 would fall under? Is there some other bucket it might fall
18 under?

19 MR. FAIL: Whether or not this is a post-petition
20 payable, Your Honor, the Debtors will investigate all
21 claims, whether they're pre-petition --

22 THE COURT: Well, I'm asking you the question.

23 MR. FAIL: -- no, I know, I know, I just want to
24 state for the record. Additional facts that haven't been
25 stated here, but I think that we put in our reply, but if

1 not, I'm happy to add right now, title passes, in general,
2 for all foreign vendors to the Debtors, when they deliver
3 them to a consolidator or the port in foreign places, such
4 as Hong Kong, Bangladesh, and India.

5 THE COURT: Right.

6 MR. FAIL: At that point in time, the Debtors may
7 take the position that a claim arose. That would put it,
8 perhaps, outside of the § 503(b)(9), and the delivery
9 overseas, over water, and received by the Debtors may or may
10 not, we think not, incur an administrative expense, but
11 we'll brief that at a later date.

12 THE COURT: All right.

13 MR. FAIL: The point of the Debtor that's applied
14 here --

15 THE COURT: And then the question is -- there's
16 the Order, too.

17 MR. FAIL: The Order, Your Honor, was -- we'll
18 deal with that interpretation, again --

19 THE COURT: Okay, anyway --

20 MR. FAIL: -- I'll reserve all rights. I'll --

21 THE COURT: -- you're reserving your rights. I'm
22 not -- I'm not trying to box you in to say, this falls
23 within, but I'm just saying, if it's --

24 MR. FAIL: I'll respond.

25 THE COURT: -- if it's an administrative expense,

1 if it's a post-petition payable, is that the bucket that
2 would be applied in the ESL deal, or some other buckets too?

3 MR. FAIL: The Debtors are going to be working
4 with ESL on a number of different fronts, as we get into the
5 post-closing phase --

6 THE COURT: Right.

7 MR. FAIL: -- including the thousands of contracts
8 that are going to be determined to be assumed or assigned,
9 and I know that's the next motion, but they're very plain,
10 Your Honor.

11 THE COURT: Certain -- They could be, because
12 you'd have to cure the default.

13 MR. FAIL: There's 60 days to figure out whether
14 contracts are going to be assumed or assigned, and then
15 there's the purchase orders that you heard about at the
16 trial, Your Honor, and whether or not certain post-petition
17 liabilities are assumed. It depends on whether these are
18 post-petition liabilities, and it depends on which ones are
19 going to get assumed. But, we're going to be working with
20 ESL, but the point is, it hasn't been determined yet. I
21 can't say for sure right now, and that's why this Motion is
22 premature. Claims may be satisfied. All we're saying, Your
23 Honor, is, we waited for the bar, then send the reply. We
24 waited to file a bar date so we didn't trigger flooding of
25 claims for protection agreements with other claims for

1 contracts that were assumed, so that there wouldn't be
2 needless administrative expenses, the parties filing claims
3 having to reconcile for things that there are no claims.
4 The Debtors need time to figure out which liabilities pre,
5 priority or post, are going to be paid for, either by the
6 reorganized, or the going forward concern New Company, or by
7 the Debtors, in connection with the sale. It's possible
8 that even cure amounts -- post-petition cures, will be paid
9 through our -- by the Debtors. We need to let that play
10 out, and I certainly can't make any representation for \$370-
11 something thousand dollars of seven invoices for Milton
12 today.

13 THE COURT: So, there's 60 days to assume
14 contracts --

15 MR. FAIL: Under the contracts.

16 THE COURT: -- if this -- under the ESL contract,
17 if the purchase orders that we're going to talk about next,
18 are in fact, executory, ESL would, I'm assuming, unless they
19 find some other supplier, they're going to want to assume
20 that.

21 MR. FAIL: I can't make any representation on
22 that.

23 THE COURT: But anyway, in 60 days, you'll know
24 one way or the other.

25 MS. BENCZE: Your Honor --

1 MR. FAIL: We'll know one way or another.

2 THE COURT: And on the non-executory contracts,
3 and just assume for a moment that these purchase orders have
4 already been performed, except for the payment of money, so
5 that'll be non-executory even on that basis, whether or not
6 they're executory as purchase orders, ever. You're saying -
7 -

8 MS. BENCZE: Your Honor --

9 THE COURT: -- let me -- I'm just trying to make
10 sure I understand --

11 MS. BENCZE: Oh, I'm sorry.

12 THE COURT: -- what Mr. Fail is leading up to.
13 You're saying that there would be a process whereby people
14 would submit their claims and the Debtors will go through
15 those, in some instances with ESL, which may have other
16 dealings with these vendors, going forward, and come up with
17 a -- with, in essence, a payment plan?

18 MR. FAIL: I'm saying, Your Honor, we'll certainly
19 have more clarity in this next 60 days. The sale closed
20 Monday afternoon. It's Thursday right now, maybe? The
21 parties have been working on it, on a number of issues, and
22 all we're saying, Your Honor, is, file a proof of claim. If
23 they think they're entitled to priority, they can mark the
24 box. If they think they're entitled to administrative
25 expense, they can mark the box. § 503(b)(9) claims aren't

1 being paid outside of the assumption of liabilities of the
2 ESL transaction. They're -- it's -- Milton isn't being
3 prejudiced. These aren't perishable goods that we're
4 talking about. There's absolutely no cause --

5 THE COURT: The only prejudice is that they're not
6 getting paid. But --

7 MR. FAIL: Amongst other people, and it's not
8 obvious that they're entitled to it.

9 THE COURT: -- the Code doesn't -- the Code
10 doesn't require payment of administrative expenses until
11 confirmation. The Debtor has discretion to pay them, and
12 the Debtor needs to be careful not to prefer some over
13 others, but even there, they have some discretion. So, it
14 seems to me that I should adjourn this motion.

15 MS. BENCZE: I just have one question that I was
16 going to ask. I believe there has been a list filed of the
17 contracts, potentially, to be assumed with a cure?

18 THE COURT: That's a -- but that's not a final
19 list.

20 MS. BENCZE: I know it's not -- I know it's not a
21 final list, but I just wanted to alert -- we're not on it.

22 THE COURT: Okay.

23 MS. BENCZE: So, to us, this function was not
24 premature.

25 THE COURT: Well, but they have 60 days.

1 MS. BENCZE: Fine.

2 THE COURT: So, I -- you know. I think your
3 client should ask themselves, are there other people that
4 could buy these Craftsman tools?

5 MS. BENCZE: Well, I mean, our relief is -- part
6 of our relief on all these motions was to be able to sell it
7 to -- if they don't want to assume the contract, was to sell
8 it to Stanley, or an authorized dealer.

9 THE COURT: Right, but they are -- they are, you
10 know, they're Craftsman tools.

11 MS. BENCZE: Yeah.

12 THE COURT: A couple months is not going to --
13 they're not going to, you know --

14 MS. BENCZE: I think we're paying -- on the
15 executory contracts, we're paying for storage, so that's
16 part of it.

17 THE COURT: Right, but I'm just focusing on the
18 503 motion at this point.

19 MS. BENCZE: Yes.

20 THE COURT: It's not like cheese.

21 MS. BENCZE: Not going to go bad?

22 THE COURT: They're screwdrivers and things like
23 that.

24 MS. BENCZE: Some cheese tastes good when it goes
25 bad.

1 THE COURT: Well, it depends on the cheese.

2 MS. BENCZE: Yeah.

3 THE COURT: So, can we turn to the 365 motion,
4 now?

5 MS. BENCZE: Okay, Your Honor.

6 THE COURT: It's a Motion to Compel Assumption or
7 Rejection.

8 MS. BENCZE: Yes, Your Honor.

9 THE COURT: I guess, one issue I had there is, I'm
10 not sure -- it's a two-edged sword for both of -- both
11 parties here. The non-Debtor party to a non-executory
12 contract is supposed to perform. I'm not sure your client's
13 performing. On the other hand, the Debtors may still want
14 to say that it's either executory or non-executory. They
15 want to, I think, preserve their flexibility on that.

16 MS. BENCZE: Well, they haven't said it's non-
17 executory.

18 THE COURT: Right.

19 MS. BENCZE: They reserved their rights.

20 THE COURT: They reserved their rights, and so, I
21 guess the issue I have -- they're not -- are they demanding
22 that they perform, though? Are they demanding that these
23 tools be delivered?

24 MS. BENCZE: No.

25 MR. FAIL: I don't think so, Your Honor.

1 THE COURT: All right, so, I think -- I don't want
2 to put words in your mouth, but tell me if I'm wrong. It
3 seems to me that --

4 MR. FAIL: And Your Honor, I think specifically
5 not. I think that's the issue. I think specifically, if we
6 had asked for them to deliver them --

7 THE COURT: Yeah.

8 MR. FAIL: -- then we would be obligated to pay
9 for them, and I think specifically, we're not --

10 THE COURT: We're not doing --

11 MR. FAIL: -- which is why they're holding them,
12 so that they don't have to be paid for.

13 THE COURT: I mean, the criteria for compelling
14 assumption or rejection, to my mind, it's a hard -- it's a
15 pretty hard burden for the movant to compel assumption or
16 rejection, and the most appealing case for the movant is
17 where the Debtor is saying to the non-Debtor contract party,
18 perform, perform, perform, you have to, 365 requires it, and
19 by the way, we're not paying you, or there's a real risk
20 we're not going to pay you. Even there, the Second Circuit
21 in Burger Boys said, that's not a per se reason to compel
22 assumption. But, it's a pretty appealing reason, under the
23 facts, and the Court has a fair amount of discretion. But,
24 I didn't get the impression here that that -- and then Mr.
25 Fail just confirmed it, that that's what the Debtor is

1 saying. You know, you are incurring some storage costs, I
2 appreciate that, but they're not taking, at this point, the
3 tools.

4 MS. BENCZE: Well, that's why I'm saying, reject.
5 That's what --

6 THE COURT: Well, but -- but they -- may -- the
7 buyer may well assume them. And, you may want them to be
8 assumed. If -- you know, because then they'll pay. And,
9 the reason the burden is heavy to compel assumption or
10 rejection is that, that's an option that debtors have. I
11 mean, that -- you know, the Bankruptcy Code gives debtors
12 that flexibility, to decide -- and here again, we have a
13 deadline. I mean, it's 60 days, and, hopefully, they'll let
14 you know before then, and I'm assuming, for their larger
15 vendors at least, they'll be very quickly trying to -- and
16 this is what I've told -- this was my last parting word to
17 Mr. Lampert's representative who was in the courtroom, which
18 is, reach out right away to the vendors and -- as well as to
19 the employees and you know, establish those -- get those
20 relations on good terms.

21 So, I'm assuming that that will happen, if your
22 client is an important vendor, and that -- you know,
23 Craftsman tools are certainly important to Sears, so I would
24 think that they'd be reaching out to them before the 60
25 days. But it's -- we know there's a 60-day limit. So, to

1 me, that does not seem to be unduly burdensome under the
2 case law. You know, Judge Lifland dealt with this at some
3 length in the Dana Corp case, 350 B.R. 144 (Bankr. S.D.N.Y.
4 2006). It's a balancing test, but unless the -- to my mind,
5 unless the non-debtor contract party is really being put to
6 the wall by being forced to perform without any real
7 assurance that they're going to get paid, and then, the --
8 in almost every case, they're going to lose. And even
9 there, you know, in, in re Burger Boys 94 F.3d 755 (2d. Cir.
10 1996), even under that scenario, the Second Circuit said,
11 you know, that's not a per se reason to compel assumption or
12 rejection. There may be a good reason to delay assumption
13 or rejection, even if the Debtor isn't paying. But here,
14 they're not requiring performance, so, I'm going to -- I
15 think both of these motions should be adjourned.

16 MS. BENCZE: Yes, Your Honor.

17 THE COURT: We can see where we are at the next
18 omnibus. I'm expecting -- as well as there being a report
19 on the plan progress, we can have a report on the
20 reconciliation process on the administrative expenses, and
21 we'll see where we are then. Hopefully, they'll give that
22 to you before the hearing, and you'll say, let's adjourn
23 this another 30 days.

24 MS. BENCZE: Okay, Your Honor.

25 MR. FAIL: Your Honor --

1 MS. BENCZE: Is the next omnibus this month?

2 MR. FAIL: No, the next omnibus is --

3 MS. BENCZE: March?

4 MR. FAIL: -- is March 21st, I believe. But I
5 think the bar date order and the § 503(b)(9) procedures
6 order, we've requested that any requests that are filed be
7 adjourned until April, in the very least. So we would
8 expect that this --

9 THE COURT: Well, we'll see where we are. I'm
10 assuming that there will have been some outreach by ESL
11 before then, at least, to some of these -- to the vendors.

12 MR. FAIL: I hope that's the case.

13 THE COURT: I hope so, too.

14 MS. BENCZE: Me too, Your Honor.

15 THE COURT: Okay.

16 MS. BENCZE: All right, thank you very much.

17 THE COURT: Okay, thank you.

18 MR. FAIL: Thank you. Your Honor, the next item
19 on the agenda is another third-party motion, but No. 5 on
20 the agenda. It's the Motion for Relief from Automatic Stay
21 filed by Mr. Ng, and I see Mr. Ng is in the courtroom today.

22 THE COURT: Right.

23 MR. NG: Good morning, Your Honor.

24 THE COURT: Good morning, and you're Mr. Ng?

25 MR. NG: Yes, Your Honor.

1 THE COURT: And you're representing yourself?

2 MR. NG: Yes, Your Honor.

3 THE COURT: Okay.

4 MR. NG: Briefly, the last time we were in here, I
5 was here, you indicated that if I identified insurance that
6 the defendants -- that the Debtors did not identify, then
7 most likely, it would mean that they would have perhaps okay
8 with the stipulation.

9 THE COURT: Well -- yeah.

10 MR. NG: I have not received a stipulation. I
11 received a letter asking me to withdraw, and then --

12 THE COURT: Well, in the Debtors' response to your
13 Motion, they say that they have insurance for these types of
14 claims, but there is a \$5 million-dollar limit on it, and
15 they've already -- that's already been exceeded. So -- and
16 secondly, that there's no duty to defend provision in that
17 insurance that would require the insurer to take over the
18 defense of your litigation. So, while there was insurance,
19 at some point, and there is a policy that might cover your
20 claim, it's, they say, as a factual matter, it's not
21 available at this point, and there's no insurance for the
22 defense costs, so they would have to be paying the lawyers
23 for litigation of this pre-petition claim.

24 MR. NG: Well, that's not what I received in the
25 email last week.

1 THE COURT: Well, okay, but do you have anything
2 to show that there actually is live insurance that would
3 cover them?

4 MR. NG: Well, yes. They indicated to me that
5 there was a \$5 million-dollar insurance, and that -- with a
6 \$5 million-dollar deductible. My understanding, from
7 information that I gathered that, they -- is the Debtor will
8 not be forced to pay a \$5 million-dollar deductible because
9 the insurance is supposed to pay first.

10 THE COURT: No, but -- that's fair, but they say
11 that the general liability policy that covers incidents, you
12 know, between August 1, 2016 and August 1, 2017, has a \$5-
13 million aggregate limit, and that paid lawsuits have already
14 exceeded that limit. So, the fact that there is a \$5-
15 million deductible is another fact, but their key point is
16 that, there's -- they've exceeded the limits of the policy,
17 at this point.

18 MR. NG: That's not the insurance that I'm looking
19 at here, where I'm -- they -- the policy is that the general
20 liability that I'm looking at, dated August 1st, 2018 to
21 January 1st, 2019.

22 THE COURT: But when did your accident happen?

23 MR. NG: The accident that I'm making claim for --

24 THE COURT: Yeah.

25 MR. NG: -- is -- it happened August 2018, August

1 2018 and in November 2018. November 2018. That's what --
2 that's what I'm looking at.

3 THE COURT: When did -- when did -- what was the
4 accident?

5 MR. NG: Okay, the first issue came up with
6 respect to the month that lead me to see Dr. Ed to get the
7 medical treatment now, I have been on these medications.

8 THE COURT: Right, but when did that happen?

9 MR. NG: Just August -- November 2018.

10 THE COURT: No, but --

11 MR. NG: And it's in my --

12 THE COURT: But your complaint is a pre-bankruptcy
13 complaint.

14 MR. NG: Well, no, no, no, Your Honor, I had two
15 separate matters before the Bankruptcy Court. One of which,
16 an action I already filed, and one is to filed November --
17 which I had --

18 THE COURT: No, but that's -- let me just -- I --

19 MR. NG: They have been fully amended from --

20 THE COURT: I have a copy of the complaint, here -
21 -

22 MR. NG: Yes, and I'm --

23 THE COURT: -- which is Exhibit -- well, it's a
24 Summons of Complaint, Supreme Court, State of New York, it's
25 dated March 28, 2018.

1 MR. NG: Yes.

2 THE COURT: And it says, this is an action for
3 leave to settle ongoing disputes concerning --

4 MR. NG: Yes.

5 THE COURT: -- neglect, (indiscernible) and
6 refusal by Defendant (indiscernible) claims (indiscernible)
7 services to investigate a latent injury claim, which was
8 filed with them as a result of an exposure to toxic
9 substances in July 2010 --

10 MR. NG: Yeah.

11 THE COURT: -- and then -- and a neglected
12 (indiscernible) by Defendant Kmart to safeguard claimant's
13 medical records, and then if you go down, it says: "Kmart's
14 data systems was breached several times between January 2013
15 and May 2017."

16 MR. NG: Right.

17 THE COURT: So, that seems to me to be the period
18 where this injury happened, as far as the Debtor was
19 concerned, is the medical records breach.

20 MR. NG: No, Your Honor, there is a legal matter
21 that I had for --

22 THE COURT: Well, I'm just dealing now with the
23 existing complaint, which is -- you are also looking to
24 relief -- for relief on the stay to go pursue that action,
25 still, in New York State Supreme Court, right? The pending

1 complaint?

2 MR. NG: Well, this is where we are --

3 THE COURT: That was removed?

4 MR. NG: -- no -- that is part of what we were
5 trying to negotiate the settlement of the ADR. But, during
6 the period of time we came before the Supreme Court, and the
7 judge had asked for -- whether there was records that was
8 delivered to me, and they did not provide the records that
9 was under the judge's order.

10 THE COURT: Well -- I'm sorry.

11 MR. NG: And then how that --

12 THE COURT: But I want to break this down, okay?
13 Because you made a Motion for two -- to lift the stay for
14 two things. The first one was, to lift the stay to continue
15 to pursue the causative actions that are laid out in this
16 complaint that I just quoted from.

17 MR. NG: Yes.

18 THE COURT: The second one was to bring a new
19 action --

20 MR. NG: Yes.

21 THE COURT: -- it wasn't that clear to me what
22 that was for. We can talk about it in a moment.

23 MR. NG: Yes, yes.

24 THE COURT: But, as far as the first part of the
25 relief you're seeking --

1 MR. NG: Yes, Your Honor. Yes, Your Honor.

2 THE COURT: -- it appears to me that, there is no
3 insurance --

4 MR. NG: Yes.

5 THE COURT: -- available for that claim.

6 MR. NG: That's what I understood from them.

7 THE COURT: Okay, so that's -- so, I'm going to
8 deny the Motion as far as that claim is concerned.

9 MR. NG: Okay, Your Honor.

10 THE COURT: If there's -- under the relevant case
11 law, which goes back to the Sonnax case. This isn't
12 insured, as a practical matter. The claims that are laid
13 out in the Amended Verified Complaint in the New York State
14 Supreme Court action, because the insurance has been used up
15 for that -- for that period that Kmart is alleged to have
16 done the breach of the data, which was January 2013 through
17 May 2017, which is what the complaint says.

18 MR. NG: Okay.

19 THE COURT: So, I'm denying that portion of the
20 Motion.

21 MR. NG: Yes, Your Honor.

22 THE COURT: So, then, that -- the second portion
23 of the Motion seeks to bring a new claim?

24 MR. NG: Yes, Your Honor. That claim, dated
25 November 13th, and that is after I suffered the injury, and

1 have to see doctor.

2 THE COURT: Right, but is that for the same
3 exposure? What is the claim against Kmart that dates from
4 the post-bankruptcy period?

5 MR. NG: Okay, it all began in 2010 when I went
6 there and I got treatments.

7 THE COURT: Right, no, I understand all that, but
8 what new thing has Kmart, you allege, done, after the start
9 of this bankruptcy case in October '13?

10 MR. NG: Yeah, they have lied to the Supreme Court
11 that they have given me records, medical records, when they
12 did not.

13 THE COURT: But is that -- is that -- you made a
14 request after the start of the bankruptcy case?

15 MR. NG: No, Your Honor.

16 THE COURT: Well --

17 MR. NG: It was before the bankruptcy that the
18 judge -- the hearing was October -- September 2018, and the
19 judge went -- sent an Order for -- give me a moment, Your
20 Honor. Okay, so the judge said -- the judge issued a
21 subpoena and they did not provide me with all the records
22 like, that I need.

23 THE COURT: The request -- so, you requested
24 records of them --

25 MR. NG: Yeah, the judge --

1 THE COURT: -- when -- I'm sorry, when did you
2 make that request?

3 MR. NG: The judge signed the Order June 29, 2018.

4 THE COURT: Right.

5 MR. NG: They were served, and we all just
6 appeared before the judge --

7 THE COURT: Right, but then the bankruptcy
8 happened, so they probably didn't -- then everything
9 stopped, is my guess.

10 MR. NG: Everything stopped, but the judge still
11 appear -- during that time, after heads --

12 THE COURT: So, it's a -- basically, to provide
13 records now?

14 MR. NG: To provide records.

15 THE COURT: Okay, so I can I interrupt you? If
16 that's the case, can they provide him the records?

17 MR. NG: They did not.

18 THE COURT: No, I'm asking the Debtors' lawyer. I
19 don't necessarily view this as a litigation. I just think
20 he's entitled to his records, right?

21 MR. FAIL: In the -- I have the attached copies,
22 Your Honor, of the records that he received, and I think
23 he's saying they were falsified. I don't think there's -- I
24 don't think anybody's denying him. I think they don't
25 understand what he's asking for.

1 THE COURT: You think -- you think they're
2 incorrect, or is it you think they're falsified?

3 MR. FAIL: I thought he's attached all his pleas
4 to his records.

5 MR. NG: The judge find this -- made an order and
6 had found that this is something that is subject for trial,
7 a trial. Trial of fact.

8 THE COURT: Well, but -- I guess --

9 MR. NG: Here's the trial --

10 THE COURT: I'm trying to -- I'm trying to
11 formulate what I want to say. Whether you have a new claim
12 or not, for 2018, depends on when that claim arose, and if
13 you're saying that the Debtors have an obligation to give
14 you records in 2018, and they didn't do it, then that might
15 be a 2018 claim. On the other hand, if you're saying the
16 Debtors have an obligation to give me records, and they gave
17 me the records, but the records are false --

18 MR. NG: Utterly.

19 THE COURT: -- and the alterations happened in the
20 past, not in 2018, then you don't have a 2018 claim.

21 MR. NG: It happened in 2018.

22 THE COURT: Well, I'm sorry, you're saying that
23 they were falsified in 2018 --

24 MR. NG: Yes, in 2018.

25 THE COURT: -- as opposed to in the past?

1 MR. NG: Yes, within November 6, and November 6,
2 2018, (indiscernible).

3 THE COURT: Well, we have a -- we have a --
4 there's an administrative claims bar date, okay, that's
5 going to be set. This would be a post-petition claim,
6 because you're saying it's November, right?

7 MR. NG: It's November and August, and --

8 THE COURT: Well, if it's August, it's pre --
9 anyway, there's going to be a bar date. I'd rather not do
10 this orderly. I think you need to comply with the bar date,
11 file your claim, and then they'll have a better idea of what
12 it's about, and it'd probably be -- I don't know how we
13 liquidate it. I can't tell you right now, sir, but it
14 doesn't sound like -- it's sounds like it may -- depending
15 on what the claim actually says in writing, I can figure out
16 how to deal with it.

17 MR. NG: Well, I suffered emotional distress, so I
18 want --

19 THE COURT: No, I don't mean the consequences of
20 the claim. I'm saying, where the claim -- how the claim
21 arose, what the claim is based on, and I don't really know
22 enough about that, at this point, because I don't have
23 anything that really lays it out. The -- a bar date order
24 what will say, you have to file proofs of claim by X date,
25 you know, I don't know what it'll be, end of March,

1 beginning of April, some date. File your claim, lay out
2 what you think the claim is and when it arose and what it's
3 for, and then we can decide what to do with this. I don't
4 really -- I have your complaint for the State Court action.
5 I know what that's about, but I don't really have anything
6 that lays out this claim.

7 MR. NG: Well, the claim that I'm referring to
8 right now, that --

9 THE COURT: No, I -- I -- look, I do much better
10 with things in writing.

11 MR. NG: Yes.

12 THE COURT: You need to lay it out in writing,
13 because it -- I couldn't figure it out, okay?

14 MR. NG: Okay, Your Honor. So --

15 THE COURT: So, I'm going to adjourn this until
16 after the bar date, the hearing on this motion, I'm going to
17 adjourn it until after the bar date. The bar date will be
18 set very soon. It'll probably be a hearing in April, okay?

19 MR. NG: Okay, Your Honor.

20 THE COURT: Okay.

21 MR. NG: I'm suffering a lot of damages and
22 medical bills and everything, and that's why I'm trying to
23 seek -- get justice.

24 THE COURT: And if it was a question of the
25 records being released, I would direct the Debtors to

1 release the records, but it sounds like they were released
2 to you. The dispute is to whether they were altered at some
3 point.

4 MR. NG: They were altered.

5 THE COURT: Well, I -- but that doesn't -- see,
6 that's a different type of claim than just giving you
7 records so you can go to a doctor and deal with them, so I'm
8 going to adjourn this until the first omnibus hearing after
9 the bar date is set.

10 MR. NG: One other thing I would like to mention,
11 Your Honor, is that I did make reference to the Unclean Hand
12 Doctrine, that I had laid out in my papers, and they make no
13 -- they did not address these.

14 THE COURT: Well, that's really a defense.
15 They're not asserting a claim against you.

16 MR. NG: Well, they're seeking to have the matter
17 denied, and --

18 THE COURT: No, but the Unclean Hands is a
19 defense, saying, you can't assert a claim against me, a
20 defense that you would have, that Sears can't assert a claim
21 against you because they have Unclean Hands, but they're not
22 asserting a claim against you, so I can see why they didn't
23 respond to that.

24 MR. NG: Yeah, so, if I understand you correctly,
25 I should wait until I get some sort of order --

1 THE COURT: Yeah, we'll serve you with notice of
2 the bar date. If you want to still file a claim, file a
3 proof of claim, and I'll have that in front of me when I --
4 when we come back here on the remaining part of your Motion.
5 I'm denying the first part, because there's really -- the
6 record doesn't reflect any real insurance for that. The
7 second part, we'll deal with it after the bar date, when I
8 can see where the claim -- what the claim really is for.

9 MR. NG: Okay, but I can go ahead and do the proof
10 of claim --

11 THE COURT: Yeah. I mean, if you don't give me
12 the proof of claim, we're -- you know, that's the end. So,
13 you need to comply with the bar date order and file a proof
14 of claim describing the claim.

15 MR. NG: Yeah, so, I should not do it before --
16 until I get the bar --

17 THE COURT: You can do it -- you can do it before.
18 There's no reason that you have to wait until you get the
19 order.

20 MR. NG: Okay. Okay, thank you. Thank you very
21 much.

22 MR. FAIL: Thank you, Your Honor. Just to close
23 out the record on this, again, Garrett Fail from Weil for
24 the Debtors. Based on what we've heard so far, being
25 alleged, it sounds like the entirety of Mr. Ng's claims

1 would be pre-petition, not what we --

2 MR. NG: It might will be.

3 MR. FAIL: -- so, we encourage him to file a claim
4 by the pre-petition claims bar date as well, making whatever
5 allegations he may. I would also just point out for this
6 Court, and again, for Mr. Ng, that this -- his underlying
7 case that has been filed is no longer pending in New York
8 State --

9 THE COURT: It's in Federal Court, now. It's been
10 moved.

11 MR. FAIL: Thank you, so, Mr. Ng has already
12 appeared post-bankruptcy, in the New York State Court, and
13 has sought another hearing, has indeed advised Mr. Ng that
14 the automatic stay remains in place. The Debtors will not
15 be participating in either New York State or Federal
16 District Court with regard to his pre-petition matter. In
17 response, Mr. Ng has sent me and my firm threats for
18 defamation. We'll ignore that for now, but I just want to
19 advise him again, we won't be participating in Court. Those
20 actions were stayed.

21 THE COURT: Okay. All right. So, Mr. Ng, if you
22 can just come up for a second.

23 MR. NG: Sure.

24 THE COURT: Two things. First, I referred to the
25 State Court complaint, but that action was removed to

1 Federal District Court, so it's actually pending Federal
2 District Court at this time. That's the first point. It's
3 not actually in the State Court, it's in the Federal
4 District Court. That action names other parties besides
5 Kmart. There are other parties who are Defendants in that
6 action. It is stayed by the automatic stay, as to Kmart.
7 So, you can't -- you can't invoke the Court against Kmart.
8 So, you can't get relief against Kmart from the District
9 Court, or if the District Court, for some reason, sends it
10 back to the State Court, from the State Court. If there are
11 third parties, that the stay doesn't apply to, you know, you
12 can go against them, but not against Kmart, okay?

13 MR. NG: Well -- just to add something that,
14 perhaps, you are not aware of, the Supreme Court judge did
15 make an order, and in that request, any -- didn't make any
16 sort of move. I was advised by the Court to appear for the
17 hearing, the judge made an order, for all parties to appear,
18 March 13th, this coming March 13th.

19 THE COURT: Well, that's not Sears, because the
20 stay applies to Sears.

21 MR. NG: Sorry?

22 THE COURT: That's not Kmart, because the stay
23 applies to Kmart.

24 MR. NG: So --

25 THE COURT: It won't include Kmart.

1 MR. NG: It wouldn't include Kmart?

2 THE COURT: No.

3 MR. NG: I don't -- after (indiscernible).

4 THE COURT: Have you given the State Court notice
5 of the bankruptcy?

6 MR. FAIL: We gave the State Court -- we gave Mr.
7 Ng. We're happy to arrange.

8 THE COURT: So, they understand this.

9 MR. FAIL: We'll take care of it, Your Honor.
10 We'll advise the State Court.

11 THE COURT: I -- I'd give lectures to the State
12 Court judges just up the road at the judicial college that
13 they have at Pace Law School. They understand the automatic
14 stay.

15 MR. NG: Yeah. The State Court told me they
16 didn't receive anything, so that's why -- that's why -- how
17 is State Court not aware?

18 THE COURT: Fine, I understand. That's the State
19 Court's issue. You cannot seek relief against Kmart.

20 MR. NG: I'm not seeking any relief of there, Your
21 Honor.

22 THE COURT: Okay. All right.

23 MR. NG: Thank you. Thank you.

24 THE COURT: Okay, thank you.

25 MR. FAIL: Thank you, Your Honor. That concludes

1 today's agenda.

2 THE COURT: Okay, thank you.

3 MR. FAIL: Thank you.

4 MR. COLLINS: Thank you, Your Honor.

5 (Whereupon these proceedings were concluded at 11:29 AM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya
Ledanski Hyde

Digitally signed by Sonya Ledanski
Hyde
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Date: February 18, 2019

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